

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL D. ZOECKLER

Appeal 2007-0008
Application 09/818,023
Technology Center 3700

Decided: November 27, 2007

Before MURRIEL E. CRAWFORD, JENNIFER D. BAHR, and
LINDA E. HORNER, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant filed a Request for Rehearing (hereinafter “Request”) on July 2, 2007 pursuant to 37 C.F.R. § 41.50(b)(2) requesting reconsideration of our Decision mailed May 30, 2007, wherein we reversed the decision of the Examiner and entered new grounds of rejection of claims 1-15 under 35 U.S.C. § 103(a). Specifically, in our Decision, we rejected claims 1-4 as unpatentable over Campbell (US 1,600,396, issued September 21, 1926) in

view of Appellant's admission (Spec. 36:24-26) and Seufert '916 (US 4,733,916, issued March 29, 1988); claims 5-7 and 11 as unpatentable over Campbell in view of Appellant's admission (Spec. 36:24-26), Seufert '916, and Seufert '206 (US 4,064,206, issued December 20, 1977); and claims 8-10 and 12-15 as unpatentable over Campbell in view of Appellant's admission (Spec. 36:24-26), Seufert '916, Seufert '206, and Haddock (US 3,735,674, issued May 29, 1973).

Claims 1-4

Appellant's Request alleges that we erred in rejecting claims 1-4 because we misapprehended or overlooked that the method of Seufert '916 for forming a fold line or score line in carton blank material that is wider in one region and narrower in another region is particularly directed to plastic carton blank material, not to paperboard carton blank material (Request 4). Specifically, Appellant points out that in forming a fold line with wide and narrow portions in the plastic sheet, Seufert '916 makes use of hot stamping or high frequency heating, which melts the plastic¹ (Request 3-4). Thus, according to Appellant, the Seufert disclosures would not have suggested to one of ordinary skill in the art the use of such processes for the paperboard used in the Campbell method, which does not melt, and would not have enabled one of ordinary skill in the art to form the Campbell fold (score)

¹ In fact, Seufert '206, referenced in Seufert '916, teaches that "only a narrow strip of the inner part of the plastic material is melted," while the outer surfaces of the sheet are kept at a temperature below the melting temperature of the plastic sheet, preferably above the softening temperature of the plastic, in the high frequency heating technique (Seufert '206, col. 2, ll. 38-68). "[T]he melted plastic moves slightly sideways forming a bulge [30a; figs. 3 and 4] which gives the fold line its characteristic cross section and characteristic bending behavior" (Seufert '206, col. 2, ll. 65-68).

lines with wide and narrow portions (Request 4-5). Appellant reasons that, since the paperboard blank and fabric tape employed by Campbell do not melt, there would be no reason to use a process that employs heat to form the Campbell fold (score) lines (Request 5). Appellants further *speculate* that if one were to attempt to use the Seufert high frequency process or hot stamping process to form the fold lines in the Campbell process, the heat might burn or sear the paperboard or prematurely set the adhesive, contrary to Campbell's express teaching that the adhesive should not dry until after the scoring is completed (Request 5). For the reasons that follow, Appellant's arguments do not persuade us that we erred in entering a new ground of rejection of claims 1-4 as unpatentable over Campbell in view of Appellant's admission and Seufert '916.

First, Appellant's arguments misapprehend our reliance on Seufert '916. As we made clear on page 10 of our Decision, based on the content of Appellant's admission (Spec. 36:24-26), a person of ordinary skill in the art would have appreciated that the score (fold) lines 9 extending across the lines of reinforcement of Campbell's carton blank should be formed so as to be wider in the reinforced area (the thicker material) and narrower in areas that are not reinforced (the thinner material). Consequently, the content of this admission alone is sufficient to have prompted one of ordinary skill in the art to form the score (fold) lines 9 extending across the lines of reinforcement of Campbell's carton blank so as to be wider in the reinforced area than in areas that are not reinforced, thereby rendering such modification of Campbell obvious, so long as it would not have been beyond the technical grasp of a person of ordinary skill in the art to do so. *See KSR Int'l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007)("[I]f a technique has

been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.”) Seufert ‘916 was cited merely as evidence that the task of forming a score or fold line in carton blank material was not daunting to those of ordinary skill in the art at the time of Appellant’s invention (Decision 10). We did not specifically propose in our Decision that high frequency heating or *hot* stamping be applied to the paperboard product of Campbell. It is of course well established that all of the features of the secondary reference need not be bodily incorporated into the primary reference (*see In re Keller*, 642 F.2d 413, 425 (CCPA 1981)) and that the artisan is not compelled to blindly follow the teaching of one prior art reference over the other without the exercise of independent judgement (*Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 889 (Fed. Cir. 1984)). "A person of ordinary skill is also a person of ordinary creativity, not an automaton." *KSR*, 127 S.Ct. at 1742.

Moreover, Appellant presents no evidence that the use of high frequency heating or hot stamping would have been detrimental to the Campbell process utilizing paperboard blanks. Specifically, Appellant proffers no evidence to support the speculation that the heat might burn or sear the paperboard or prematurely set the adhesive. Arguments in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Appellant had the option to reopen prosecution and submit new evidence in response to our new ground of rejection pursuant to 37 C.F.R. § 41.50(b)(1) but elected not to do so, choosing instead to file a request for rehearing pursuant to 37 C.F.R. § 41.50(b)(2).

Further, while it may be true that the paperboard used in Campbell's process does not melt, Appellant's conclusion that there would be no reason to use a process that employs heat to form the Campbell fold (score) lines does not necessarily follow. First, Appellant's statement that Campbell's tapes would not melt is unsupported by Campbell, which provides for reinforcing tapes "of any material" (Campbell 2:102-104) and does not exclude tapes comprising plastic or other meltable material. Moreover, even if the paperboard and tapes do not melt, any heat-induced softening of the paperboard to make it more pliable for conforming to the score 12 would appear to be beneficial to the process. After all, Campbell teaches that "under the pressure of the scoring dies the paper and tape must *give and shift* with reference to each other" (Campbell 2:57-59).

As for Appellant's contention that the Seufert disclosures would not have enabled one of ordinary skill in the art to form the Campbell fold (score) lines with wide and narrow portions, Seufert '916 evidences that a person of ordinary skill in the art of producing carton blanks would have known how to configure the scoring die and other necessary tooling to form a score (fold) line having wide and narrow portions. That Seufert '916 does not explicitly describe the shape of such tooling is some indication at least that Seufert '916 would have expected one of ordinary skill in the art to understand how to configure such tooling. Common sense would dictate the die and corresponding tooling structure would be configured to match the desired shape of the score (fold) line, regardless of the particular material being scored to form a fold line. Therefore, we do not agree with Appellant that the applied prior art teachings would have been insufficient to enable

one of ordinary skill in the art to form the Campbell fold (score) lines with wide and narrow portions.

Claims 5-7 and 11

In addition to the arguments discussed above, Appellant additionally points out that there is no disclosure in Seufert ‘916 that the thinned-down areas and the bend lines may be formed by different parts of the same tool, for example, a multi-point rule, and Seufert ‘206 does not supply this deficiency (Request 7). Appellant is correct that neither Seufert ‘916 nor Seufert ‘206 expressly discloses the shape of the tooling used to simultaneously form the wider thinned-down areas and narrower bend lines. We also note, however, that while there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness, “the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 127 S.Ct. at 1741. Moreover, when presented with a finite number of options, such as a single, multi-point rule or multiple single-point rules, a person of ordinary skill has good reason to pursue either and “[i]f this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense.” *Id.* at 1742. As mentioned above, common sense would dictate that a scoring rule should have a shape corresponding to the shape of the desired score line. In the case of Campbell’s score lines 9 traversing the reinforced regions, that shape has a thinner section outside the reinforced region and a wider section within the reinforced region. Accordingly, a person of ordinary skill in the art, exercising ordinary common sense and creativity, would immediately

envisage a scoring rule having a thinner section and a wider section for forming such a score line. Therefore, as pointed out on page 11 of our Decision,

[t]o utilize a multi-point rule having a narrower section to form the narrower section of the bend line and a wider section to form the wider section of the bend line would require merely a predictable variation of the simple single point rule-shaped tool 20 taught by Seufert '206 well within the skill of the art and thus would have been obvious.

In light of the above, Appellant's arguments do not demonstrate reversible error in our rejection of claims 5-7 and 11 as unpatentable over Campbell in view of Appellant's admission, Seufert '916, and Seufert '206.

Claims 8-10 and 12-15

Appellant argues that it would not have been obvious to use a counter plate having a groove aligned with the scoring rule in light of the disclosure by Seufert '206 that it is important that the counter tool provide a substantially flat surface for the plastic sheets when they are cooling below the softening temperature (Request 8). As Appellant's Request is eager to point out, Seufert '206 is particularly concerned with forming score lines in plastic sheet material, while Campbell is directed to paperboard carton blanks. The disclosure in Seufert '206 (col. 4, ll. 42-50) alluded to in the Request is directed to plastic sheets that have been heated to a temperature above their softening temperature and gives no indication that this would be a concern in scoring paperboard blanks. Haddock, on the other hand, is directed specifically to paperboard blanks (col. 1, ll. 7-9) and, as pointed out in our Decision at page 12, teaches using counter plates having slots or channels in cooperation with a rule for forming creases (fold lines) in carton

blank material. It is not apparent, and Appellant has not cogently explained, why a person of ordinary skill in the art would have been led to follow the teachings of Seufert '206 in this regard over the teachings of Haddock, which are directed specifically to paperboard, the material at issue in Campbell. Accordingly, Appellant's argument does not demonstrate error in our rejection of claims 8-10 and 12-15 as unpatentable over Campbell in view of Appellant's admission, Seufert '916, Seufert '206, and Haddock.

CONCLUSION

For the reasons discussed above, Appellant's Request does not demonstrate error in the new grounds of rejection entered in our Decision. Accordingly, Appellant's Request has been granted to the extent of our reconsidering our Decision but denied with respect to making any modification thereto. This decision is now final for purposes of judicial review.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

DENIED

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WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
P.O. BOX 7037
ATLANTA, GA 30357-0037